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Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)
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ARCH COMMUNICATIONS GROUP, INC. and PAGING NETWORK, INC.	) WT Docket No. 99-365) File No. 0000053846, *et al.*) DA 99-3028
For Consent to Transfer Control of Paging, Narrowband PCS, and Other Licenses	))

To: Chief, Wireless Telecommunications Bureau

REPLY TO
OPPOSITION TO MOTION TO DISMISS

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REPLY TO OPPOSITION TO MOTION TO DISMISS

Paging Network, Inc. and its licensee subsidiaries (collectively, "PageNet"), by its attorneys and pursuant to Section 1.45(c) of the Commission's Rules, 47 C.F.R. § 1.45(c), hereby replies to the Opposition to Motion to Dismiss ("Opposition") filed by Metrocall, Inc. ("Metrocall") on October 4, 2000. Metrocall opposes the Motion to Dismiss ("Motion") filed by PageNet on September 22, 2000 requesting that the Wireless Telecommunications Bureau ("Bureau") dismiss the Petition for Reconsideration or Informal Complaint ("Petition") filed by Metrocall on September 12, 2000, as supplemented on September 18, 2000.

1. Metrocall's Petition Is Barred By Law

Notwithstanding the fact that its petition for reconsideration was untimely, Metrocall asserts that the Commission retains authority to act on such petitions through its "plenary power over spectrum licensing." *See* Opposition at 1. Metrocall fails to provide any supporting legal authority to support this sweeping assertion.

Although the Communications Act of 1934, as amended (the "Act"), vests the Commission with exclusive jurisdiction over the management of spectrum (except spectrum allocated to the Federal government) and the licensing of wireless carriers, the Commission's power is limited by the plain language of the Act. In this case, Section 405 of the Act requires that a petition for reconsideration be filed within 30 days from the date of public notice of the Commission's action. Because the time period for filing petitions for reconsideration is prescribed by statute, the Commission may not, except in extraordinary circumstances, waive or extend the filing period. *See, e.g.*, *Stephen E. Powell*, 11 FCC Rcd 11925, ¶5 (1996) (the Commission may extend or waive the 30-day filing period only in an "extraordinary case," such as where the late-filing is due to the Commission's failure to give a party timely notice of the action for which reconsideration is sought); *Greater Boston Television Corporation*, 463 F.2d 268, 289-91 (D.C. Cir. 1971) (there is no basis for reconsideration of an agency decision that has become final, at least in the absence of need to avoid an unconscionable injustice growing out of misconduct undercutting the integrity of the administrative process). The additional cases cited by Metrocall on this point in its Opposition do not help its cause; indeed, they demonstrate its lack of merit.

This case bears no similarity to those cited by Metrocall where grant of an application was made through inadvertent error, *Communications and Control, Inc.*, 15 FCC Rcd 5428 (2000), or where there were serious allegations of Executive Branch influence and Commission impropriety in a renewal proceeding that would undercut "the integrity of the administrative or judicial process," *Brandywine Main-Line Radio, Inc.*, 60 FCC 2d 755 (1976), *citing Greater Boston Television Corporation*, 463 F.2d 268, 291 (D.C. Cir. 1971).[1]

[1] In the third case cited by Metrocall, *Central Alabama Broadcasters, Inc.*, 48 FCC 2d 998 (1974), the Commission refused to treat the untimely pleading as a petition for reconsideration but found that it had jurisdiction to consider the allegations under Section 319(c) of the Act, a provision not applicable here.

Metrocall has not demonstrated that its delay in filing its Petition is due to Commission error or that the Commission's approval of the merger was the result of misconduct amounting to an unconscionable injustice. Accordingly, Metrocall's Petition is fatally defective and must be dismissed for failure to comply with the statutory provisions of the Act and the Commission's rules.

2. Metrocall Cannot Show That the Bankruptcy Plan Has Effectuated Any Transfer of Control to the Lenders

Metrocall claims that it was illegal and impermissible for Arch, in the bankruptcy plan, to agree with its lenders to pay down its outstanding loans by $110 million within one year after consummating the merger because the funds to do so may include proceeds from the sale of certain licenses that the lenders designated for possible sale. *See* Opposition at 3. Metrocall alleges that because the lenders allegedly were permitted to designate both the specific licenses to sell (which proceeds would be used for paying the loan) and the timing for sale, the lenders have been granted sufficient control over the licenses that their status should be converted from *bona fide* creditors to real parties in interest, and therefore, an unauthorized transfer of control has taken place.[2] *See* Opposition at 7.

Metrocall still has not cited a single authority which even remotely supports this claim. Instead, Metrocall continues its reliance on inapposite cases such as *KOWL, Inc.*, 49 FCC 2d 962, ¶4 (Rev. Bd. 1974), which stands for the proposition that an entity's control over a licensee's finances, under certain circumstances, may give that entity control over the license. In

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2 Far from having an interest in FCC licenses, the lenders here have an interest only in the proceeds of the sale of assets, which may include licenses. *See* Exhibits 1-4 of Metrocall's Petition for Reconsideration or Informal Complaint filed September 12, 2000, as supplemented on September 18, 2000. Under well-established precedent, a licensee such as Arch may grant an interest in the proceeds from the sale of a license to a lender. *See In re Cheskey*, 9 FCC Rcd 986, 987 (1994) (holding that licensee may give security interest in the proceeds of sale of license, but not in the license itself).

KOWL, the Review Board specifically held that "[t]he test for determining whether a third party is a real party in interest is whether that person has an ownership interest, or is or will be in a position to actually or potentially control the operation of the station." *KOWL, Inc.*, 49 FCC 2d 962, ¶4 (emphasis added). Here, Metrocall has not claimed that the lenders have been given an ownership interest in the designated licenses or that the lenders have gained control over the operation of the designated licenses. Rather, Metrocall's claim rests on the assertion that the mere designation of certain licenses for potential sale to pay off a loan commitment constitutes sufficient control over Arch's finances to make the lenders real parties in interest in those licenses. As PageNet has shown, the credit agreement does not give the lenders control over the use or operation of any of Arch's post-merger assets or licenses, its bank accounts, employees, customers, services, rates, practices or policies. Metrocall's claims concerning an unauthorized transfer of control have no basis in fact, law or policy.

Although PageNet has argued throughout that an agreement by Arch to sell some of the SMR spectrum to pay down its loans would be completely proper, it must be noted that the actual agreement does not require the sale of SMR or any other spectrum and Arch is free to raise the funds for repayment in any number of ways including the sale of other assets or raising additional capital. Metrocall's claim that the final version of this covenant means something other than what it says (Opposition at 5) is simply speculation.

Additionally, Metrocall contends that analogizing the loan covenant to an option is inaccurate. *See* Opposition at 7. Metrocall is certainly correct to the extent that the credit covenant, even in its initial form, confers on the lenders much less of an interest than would be had by an option-holder. As noted by Metrocall, in this case the lenders are not proposing to acquire any licenses, the purchaser of any licenses has not been determined (and the lenders have no right to choose the purchaser), and the specific terms of any sale have not been specified. *See* Opposition at 7. Thus, if an option does not result in a transfer of control, *a fortiori*, this covenant does not do so.

Metrocall also contends that the covenant, unlike an option, is not the result of Arch's "independent business judgment." This is pure nonsense. The credit facility is the product of negotiation between Arch and its lenders, as clearly reflected in the changes to the covenant at issue here, and Arch, in the exercise of its independent business judgment, has agreed to the terms of the facility. Arch, like any borrower, was and is free to try to find a better financing arrangement if these terms are not to its liking.

Finally, Metrocall notes that an option may be one of the factors relevant to determining control of a licensee. *See* Opposition at 8. Here, however, there are no <u>other</u> factors suggesting a change in control and, as PageNet has shown repeatedly, this covenant itself certainly does not do so.

3. Metrocall Cannot Show That Any Provision in the DIP Financing Order Is Relevant to the Merger or Has Effectuated a Transfer of Control to the Lenders

Metrocall also tries to bolster its transfer of control argument by alleging that certain language contained in paragraph 8 of the "Final Order Authorizing Debtors in Possession to Enter into Post-Petition Financing" (the "DIP Financing Order"), entered by the Bankruptcy Court on September 7, 2000, grants security interests and liens on FCC licenses, which is contrary to applicable FCC precedent. *See* Opposition at 3. In the DIP Financing Order, the bankruptcy court is merely granting a security interest in PageNet's assets to parties advancing funds to PageNet during the bankruptcy proceeding.

Whatever the import of this Order, it is irrelevant to the Arch/PageNet merger and could not warrant interfering with that transaction. The language referred to by Metrocall, moreover, appears to be boilerplate and grants a lien on "all currently owned or hereafter acquired property or assets of the Debtors . . . and all proceeds, products, rents and profits thereof, including, without limitation, . . . trademarks, trade names, licenses, causes of action . . . ." DIP Financing Order at ¶8 (emphasis added). The order makes no specific reference to FCC licenses and, because FCC licenses, as a matter of law, are not assets of a debtor that can be subjected to a lien, the court's reference to "licenses" can only refer to other types of licenses.[3] *See, e.g., In re TAK Communications, Incorporated*, 985 F2d 916 (1993) (although a broadcasting license may constitute property of the estate, it is not subject to a security interest); *In re Ridgely Communications, Inc.*, 139 BR 374, 379 (Bankr D. Md. 1992) (a creditor may perfect a security interest in a debtor's FCC broadcasting license to the extent that the creditor seeks to protect its interest in the proceeds of the debtor's license).

Finally, under the terms of the Amended Bankruptcy Plan, the liens granted under the DIP Financing Order must be satisfied as part of the bankruptcy plan consummation. *See* Exhibit One of Metrocall's Reply to Opposition to Petition for Reconsideration or Informal Complaint. Accordingly, under the Amended Bankruptcy Plan, the DIP Financing Order will expire upon consummation of the merger at the same time as these licenses pass to Arch.

Metrocall relies on *SaltAire Communications, Inc.*, 8 FCC Rcd 6284 (1993) to support its claim that the lenders here have obtained sufficient power through the repayment covenant to become real parties in interest. *See* Opposition at 7. However, Metrocall's reliance is misplaced – application of the facts in *SaltAire* to this case clearly show that there has been no transfer of control.

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3 PageNet notes that the Commission has consistently declined to consider collateral attacks on a bankruptcy court determination. *See, e.g., Arlie L. Davison and Associates, Inc.,* 11 FCC Rcd 15382, ¶17 (1996); *Fox Television Stations*, 8 FCC Rcd 5341, 5349

In *SaltAire,* the Commission considered the denial of integration credit to an unsuccessful applicant for an FM radio station, not a real party in interest claim. In that case, the corporate applicant was comprised of one shareholder who was to serve as the station's full-time general manager. The applicant also devised an unusual financial arrangement in the form of "participating notes" so that its three individual "passive investors" could claim they had no ownership interests in the applicant and thus avoid attribution of their interests for integration purposes. The participating notes provided that, for nominal $4,000 loans to the applicant, the noteholders acquired in virtual perpetuity the right to seventy-five percent of the net earnings and assets of the applicant. The notes could not be paid off except when the company was sold or dissolved. The Commission found that the noteholder's extensive rights to earnings and assets left the sole voting shareholder with little value to offer as an inducement for capital contributions from new investors or lenders. Accordingly, the Commission found that the sole "stockholder's dependency on the noteholders' cooperation for further funding gives the latter power to influence management of the corporation's affairs, thereby undercutting its integration proposal." *SaltAire Communications, Inc.*, 8 FCC Rcd 6284, ¶3.[4] The facts here are far different from *SaltAire*. Obviously, this case does not involve an integration propsoal, and unlike the noteholders in *SaltAire*, the bank lenders here have no interest in Arch's profits and can be paid off at any time. The lenders here are clearly creditors and have been granted no rights which turn them into owners.

(1993) (Commission will not interfere, absent extraordinary circumstances, with a factual question decided by a court of competent jurisdiction).

4 Additionally, the Commission found that, "[a]lthough they style themselves as mere creditors, the participating noteholders have the same essential prerogative of ownership that non-voting stockholders and limited partners enjoy: to wit, they have a perpetual right to a share of earnings, a right that, unlike the reimbursement rights of ordinary creditors, is not subject to curtailment through a discharge of indebtedness while the corporation remains in business." *SaltAire Communications, Inc.*, 8 FCC Rcd 6284, n.2.

4. Conclusion

For the foregoing reasons, PageNet respectfully requests that the Commission dismiss Metrocall's Petition.

Respectfully submitted,

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October 12, 2000

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Reply to Opposition to Motion to Dismiss was hand delivered this 12th day of October, 2000, to the following:

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